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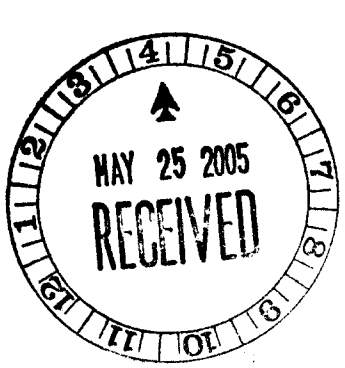

May 25, 2005

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VIA HAND DELIVERY

Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

RE: STB Ex Parte No. 230 (Sub-No. 9) -214065
WTL Rail Corporation -- Petition for Partial Revocation of Exemption

STB Docket No. 42092 -214066
WTL Rail Corporation -- Petition for Declaratory and Interim Relief

Dear Secretary Williams:

Pursuant to 49 C.F.R. 1104.13, please accept for filing the enclosed original and ten (10) copies of a reply by my clients Norfolk Southern Corporation and Norfolk Southern Railway Company to the respective petitions in the two dockets referenced above. As the petitions appear to have been filed with the Board on May 5, 2005, this reply is due on today's date.

An extra copy of this transmittal letter is enclosed. We ask the appropriate Board employee to date-stamp that copy as evidence of filing, and then return it to our delivery person. Please do not hesitate to contact undersigned counsel if there should be any questions about this filing. Thank you.

Sincerely,

Mark J. Andrews

Mark J. Andrews

Enclosures

cc: George A. Aspatore, Esq. (w/encl.)
Parties of Record (w/encl.)

BEFORE THE UNITED STATES
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 230 (Sub-No. 9) - 214065
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NORFOLK SOUTHERN'S VERIFIED REPLY TO PETITIONS

Pursuant to 49 C.F.R. 1104.13, Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "Norfolk Southern" or "NS") hereby submit their verified reply to the two petitions filed on May 5, 2005 by WTL Rail Corporation ("WTL") in the above dockets respectively. Norfolk Southern urges the Surface Transportation Board ("STB" or "Board") to deny WTL's apparent request for re-regulation of certain intermodal traffic.

Matters asserted as fact in this reply are verified by Lawrence Fabits, Group Manager – Intermodal Equipment for NS. Mr. Fabits has 15 years' experience with managing intermodal transportation equipment. He is currently responsible for managing all railroad-controlled intermodal equipment utilized by NS, including railcars, containers, trailers and chassis.

Background. Both WTL and Norfolk Southern have been beneficiaries of one of the great success stories for surface transportation in the history of this country: the phenomenal growth of rail-motor intermodal service during the past quarter century. Intermodalism has flourished in a deregulated "enterprise zone" created by the Board's predecessor body in a series of exemption decisions starting with *Ex Parte No. 230 (Sub-No. 5), Improvement of*

TOFC/COFC Regulation, 364 I.C.C. 731, aff'd sub nom. *American Trucking Associations v. I.C.C.*, 656 F.2d 115 (5th Cir. 1981).[1]

The framers of this intermodal exemption wisely allowed for commercial creativity in crafting a variety of intermodal business models through which shippers, rail carriers, motor carriers and diverse types of intermediaries could interact. The intermodal marketplace is far from monolithic. Rail carriers offer a wide variety of service "plans," and diverse types of intermediaries compete for this business. NS alone has four different service plans in common use, and provides intermodal services in conjunction with numerous freight forwarders, third-party logistics providers, truckload motor carriers, less-than-truckload carriers, shippers' agents, ocean common carriers, non-vessel-operating common carriers, intermodal marketing companies, and other types of intermediaries – who in turn serve thousands upon thousands of customers. Intermodal traffic has grown rapidly to become one of the largest business segments on Norfolk Southern's rail system.

The petitions in these dockets ask the Board to tinker with the remarkably successful exemption for rail-motor intermodal service. Although WTL nowhere specifies the extent to which it wants "partial revocation" of this exemption, the evident intent is to single out one of today's numerous intermodal business models – the one that WTL happens to utilize – for special protection through re-regulation. For the reasons stated in the remainder of this reply, Norfolk Southern objects to the granting of any such relief. WTL has failed to make a showing sufficient to justify even the opening of a proceeding on either of its petitions, let alone the granting of the requested interim stay.

[1] The abbreviation "TOFC/COFC," of course, refers to "trailer on flatcar/container on flatcar" operations, also commonly known as "piggyback" service.

Discussion. The intermodal business model used by WTL (which is not a rail or motor carrier) has involved the leasing of its fleet of approximately 950 trailers[2] for use as "railroad-controlled" equipment on the rail network in the U.S. and Canada. As WTL notes, the involved trailers generally have been retired from "over the road" use by motor carriers[3], and are 48 feet long in contrast to the 53-foot length preferred by most motor carriers.[4] These trailers have circulated on the rail network under a legal regime consisting of (i) individual trailer use agreements between WTL and each of the Class I rail carriers (including NS) (singly or collectively, the "Use Agreement(s)") and (ii) the underlying Code of Trailer and Container Service Rules developed by the Association of American Railroads (the "AAR Rules").

Several features of this legal regime are increasingly onerous for the rail industry in Norfolk Southern's experience. These include (i) rates that are generally less remunerative for the railroad than those applying to so-called "private" trailers; (ii) a rate structure that imposes higher costs on railroads for unproductive (empty) trailer movements than is the case with "private" trailers; and (iii) a provision making each railroad responsible for arranging repairs to these aging trailers when such repairs become necessary on its lines.[5] Moreover, it is not just railroads that prefer the "private" trailer business model; the market is moving in the same direction. During the first quarter of 2005 – before the events complained of by WTL – NS saw

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[2] See Lombardo Verified Statement ("V.S.") at p. 1. The fleet size of 1500, initially given at page 1 of the Petition for Partial Revocation of Exemption, was corrected by Petitioner on May 6, 2005.

[3] Lombardo V.S. at p.1 n.1.

[4] Petition for Declaratory and Interim Relief at p.16. Incidentally, WTL's suggestion that 53-foot trailers are "rejected by some railroads" (id.) does not apply to NS. In the first quarter of 2005, 53-foot trailers accounted for fully 25 percent of the intermodal trailer volume handled by NS. Both 48-foot and 53-foot equipment is freely accepted and handled by NS.

[5] While WTL's description of the distinction between "private" and "rail-controlled" trailers is partially correct (Lombardo V.S. at pp. 2-4), NS respectfully disagrees with Witness Lombardo's suggestion (id. at p.3) that the allegedly "higher freight rates" for rail-controlled trailers are sufficient "to compensate carriers for their obligation to handle empty trailers." Moreover, while Witness Lombardo is correct that WTL reimburses each railroad for trailer repairs that become necessary on its line, the fact remains that the arrangement of repairs for highway trailers (which are subject to Federal safety regulations entirely different from those applicable to rail equipment) is an administrative function that lies far outside NS's core competency.

its "rail-controlled" trailer volume drop by 16 percent while its "private" trailer volume increased by 60 percent. (The Board should bear in mind that "private" trailer terminology is somewhat misleading, because "private" trailers often are owned by intermodal service providers who have numerous customers of their own.) In addition, large and growing amounts of intermodal traffic are now moving in domestic and oceangoing containers, which (unlike trailers) can be handled on double-stack trains.

As particularly pertinent here, the traditional legal regime for use of "rail-controlled" trailers has presupposed that these trailers could operate freely throughout the North American rail network. Thus, when the Burlington Northern Santa Fe Railway Company ("BNSF") announced on April 1 that it would terminate its Use Agreement with WTL, NS was forced similarly to re-assess its relationship with WTL. As stated by a witness for WTL itself:

> The reaction [to the BNSF announcement] by the other Class 1's was by default. As the originating carrier, their railroad can't risk being caught with a loaded rail trailer, at an interchange point that ... the trailer owner is not set up to manage and [where] the receiving carrier won't accept [the trailer] in common carrier service. Under the AAR Rules the originating carrier is liable for car hire if a trailer owner has no use agreement with the connecting carrier.[6]

Although NS was left with no realistic option but to cancel its existing Use Agreement with WTL, NS is perfectly willing to continue accepting WTL trailers under revised economic arrangements that make sense in a network context under today's economic conditions. Most likely, those arrangements would involve treating WTL trailers as "private" equipment. Given the large and growing importance of intermodal traffic for NS, there is no earthly reason why NS would turn down intermodal business from WTL that makes economic and operational sense for its system.

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[6] Lombardo V.S. at p.8. Precisely because the AAR Rules only apply if a trailer use agreement exists between a given rail carrier and trailer owner, it is difficult to understand Petitioner's suggestion that the AAR rules somehow prohibit unilateral action by a rail carrier to cease handling "rail-controlled" trailers (Robinson V.S. at p.3).

Finally, certain supporting witnesses for WTL suggest that cancellation of existing Use Agreements between WTL and Class I railroads will deprive shippers of needed equipment.[7] But if there is one lesson to be learned from the Nation's spectacularly successful experiment with deregulation of intermodal service, the lesson is this: **the market will ensure that trailers necessary to meet demand will be available to shippers.** For example, if the onion shippers supporting WTL need its trailers (in addition to the vented domestic containers already coming on stream),[8] the market will adapt and those trailers can be used as "private" equipment.

Conclusion. The controversy that WTL has brought before the Board is not about the future of intermodal service or common carriage. As indicated above, NS has an enormous stake in the future success of intermodal service. Moreover, many of the intermodal intermediaries doing business with NS are themselves common carriers, whose traffic for thousands of large and small shippers is willingly handled by NS every day. The real issue here is whether one particular business model for intermodal service should receive unique regulatory protection – especially when that business model not only uses outmoded equipment, but also imposes inefficiencies on a rail system facing capacity constraints not seen for generations.

For all the reasons stated, Norfolk Southern requests the Board to issue an order denying both of WTL's petitions without further proceedings.

Respectfully submitted,

NORFOLK SOUTHERN CORPORATION
NORFOLK SOUTHERN RAILWAY COMPANY

By Their Attorneys

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[7] See, e.g., Baca V.S.
[8] Baca V.S. at p.4.

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Date Due and Filed: May 25, 2005

VERIFICATION

I, LAWRENCE R. FABITS, declare under penalty of perjury that the statements as to factual matters contained in the foregoing Verified Reply are true and correct. I further certify that I am qualified and authorized to submit those statements. Executed on May 24, 2005.

Lawrence R. Fabits

Typed Name: LAWRENCE R. FABITS

Title: Group Manager Intermodal Equipment

CERTIFICATE OF SERVICE

I certify that I have this day served copies of the foregoing Verified Reply upon all parties of record in this proceeding, by causing delivery to made upon each such party by the method indicated below:

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Dated at Washington, D.C. this 25th day of May, 20005.

Mark J. Andrews